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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE,

Plaintiff and Respondent,

v.

BRANDON JEROME YSAGUIRRE,

Defendant and Appellant.

B216520

(Los Angeles County
Super. Ct. No. KA085119)

APPEAL from a judgment of the Superior Court of Los Angeles County, Bruce F. Marrs, Judge. Affirmed.

Donald H. Glaser, under appointment by the Court of Appeal, for Defendant and Appellant.

No appearance for Plaintiff and Respondent.

Brandon Jerome Ysaguirre appeals from the judgment entered following a jury trial which resulted in his conviction of battery, causing serious bodily injury (Pen. Code, §§ 242 & 243, subd. (d)).¹ He was granted probation for three years on the condition, among others, that he serve 60 days in county jail. We affirm the judgment.

FACTUAL AND PROCEDURAL BACKGROUND

1. Facts.

a. The prosecution's case.

At approximately 2:00 p.m. on November 12, 2008, 16-year-old Luke M. was at the West Covina Department of Motor Vehicles (DMV) with his mother waiting to take the test to get his driver's license. He was sitting in his father's car when he saw Joseph Mendez come out from between some bushes and approach the DMV from the sidewalk. According to Luke M., Mendez "looked like a little old man walking with a cane, sort of hunched over, hobbling along. He was wearing a hat . . . [and] was dressed casually." Mendez walked in front of Luke M.'s car, and toward the line of people waiting to get inside the DMV. He approached Ysaguirre, who was at the DMV with his girlfriend and her four-year-old child. Mendez was leaning on his cane and the two men appeared to have a conversation. From a distance of approximately 25 to 30 feet, Luke M. saw the discussion between Ysaguirre and Mendez become heated. Ysaguirre became animated, "moving his hands, making gestures, and yelling." Ysaguirre punched Mendez in the face, knocking him to the ground. Ysaguirre then got on top of Mendez, crouched down,

¹ All further statutory references are to the Penal Code unless otherwise indicated.

grabbed him by the neck and “struck his face repeatedly with his right . . . fist.” Mendez was motionless except for “rocking back and forth [with] the punches.” Ysaguirre struck Mendez at least three times. After he was finished hitting Mendez, Ysaguirre got up, joined his girlfriend and her son, who had been standing behind Ysaguirre during the altercation, and attempted to walk away. However, a number of people stood around Ysaguirre and prevented him from leaving the area. In the meantime, Luke M. had called 911.

Robert Rivera is the manager at the West Covina DMV office. Rivera was completing a “drive test exam” when he noticed Mendez walking with a cane across the pavement between two cones. After he determined that it was safe for Mendez to walk there, Rivera turned to enter the building. When he then heard someone yelling, Rivera looked toward Mendez and saw Ysaguirre running toward him. Ysaguirre struck Mendez in the face with his fist, knocking him to the ground. Ysaguirre then stood over Mendez and punched him several more times. Mendez did nothing in response; he “just laid there.”

Jennie Mendez testified that her son, Joseph Mendez, is 58 years old. When he was 17 years old, Mendez was struck by a car on the freeway and suffered several severe injuries. According to Jennie,² he suffered a head injury which affected, among other things, his left eye. He also suffered injury to his hip and “he broke [his] urethra.” According to Jennie, “[t]hey didn’t think he was going to live.” As a result of these

² We refer to some witnesses by their first names not out of disrespect, but for clarity.

injuries, “[h]e forgets a lot” and he “walks with a cane.” Jennie used to take care of Mendez. She would give him his medication so that he would not have seizures, take him to his doctor’s appointments and do whatever else he needed. However, her own health is no longer good and she is unable to properly care for Mendez, so he has moved to the Country View retirement home. In November 2008 Mendez was living at the retirement home which is approximately 100 yards from the DMV.

Jennie testified that, in November 2008, “somebody hit [Mendez].” She went to the hospital that day to see him and noted that “[h]e was all black and blue [and] . . . he was all bruised up” on the left side of his neck. As far as she knew, Mendez had never gotten into a physical altercation with anyone before.

After he was released from the hospital, Mendez went to a convalescent home. According to Jennie, after the November incident Mendez’s memory was worse than before. She indicated: “He doesn’t remember a lot of things,” and in addition “he didn’t want to eat. He wasn’t eating the right way.”

Joseph Mendez testified that he did not remember any incidents occurring in November of 2008. He did not know why he was in court and he did not recognize the district attorney.

At approximately 7:30 p.m. on November 12, 2008, West Covina Police Officer Eddie Gomez responded to a call directing him to the hospital to interview Mendez. The officer found Mendez on a gurney in the emergency room. “[H]e had a neck brace[,] [h]is face was all bloodied [and] [h]e appeared lethargic or disoriented, confused, [and] in a daze when [the officer] spoke to him.” After photographing him, Gomez attempted to

interview Mendez. After a short conversation, during which Mendez stated that he had been run over by a car on the freeway, Mendez indicated that he remembered that he had bumped into a woman while crossing the street and the woman's boyfriend had beaten him up. Mendez did not remember anything from the time he was punched in the face until he woke up in the hospital.

Rosa Ramirez Millan is an administrator at the board and care facility where Mendez lives. For the most part Mendez was friendly and cooperative. Millan could think of only one incident when he became upset. He was playing Bingo and, after something happened, he hit the table and walked out of the room. Mendez did not play Bingo after that. After lunch on November 12, 2008, Mendez went to Millan's office and telephoned his mother. He left her a message saying that he loved her, then, as was his usual practice, went outside to pick up papers and trash in the area surrounding the board and care home. Millan did not see Mendez again that day. At approximately 3:30 p.m. she received a telephone call from a police officer notifying her that Mendez was in the hospital. When Mendez returned to the facility after the November 12 incident, he "seemed very withdrawn and very scared." He "didn't want anybody around." He seemed confused and at times, he did not know where he was. Mendez did indicate that "somebody did this to [him]" and he "want[ed] to find the guy."

Dr. Anil Gupta testified that, after the November 12 incident, Mendez suffered a "[r]ight subdural hematoma," or blood clot inside the skull, and abnormal bleeding "inside his brain." In addition, Mendez suffered "a fracture of the nose or nasal bone"

and two small lacerations on his right side. While at the hospital, Mendez was taken to the intensive care unit for neural observation.

After leaving the hospital, but before returning to the board and care home, Mendez spent some time at the Victoria Care Center. He was admitted there on November 14, 2008. Rosefer Fernandez, a nurse at the facility, testified that Mendez received physical therapy there. When he first arrived, Mendez was confined to a wheelchair. After approximately a month at the facility, he was able to walk. While at the Center, Mendez would have periods when he wished to see his mother. He would look for her, yell and clench his fists. Fernandez indicated that, on those occasions, one would have to talk to Mendez “in [a] certain way” to calm him down.

It was stipulated that, after Mendez was discharged from the Victoria Care Center, he was returned to Country View. On March 6, 2009, an “episode” occurred during which Mendez became upset because he believed that someone had stolen his money while he was taking a shower. Mendez began hitting the walls in the facility and his mother was called. He was then transported to the L.A. Metro Hospital in Cerritos. He was not accepted back at Country View “due to liability issues.”

b. *Defense evidence.*

Latasha Brown is Ysaguirre’s girlfriend. Brown and Ysaguirre live together and both work at the Home Depot in Monrovia. Brown has a five-year-old son from a prior relationship who also lives with them.

On November 12, 2008, Brown, her son and Ysaguirre went to the DMV so that Brown could renew her driver’s license. Brown did not have an appointment and, since

the line seemed to be moving very slowly, after taking a number she and Ysaguirre decided to go to the Von's market across the street to get some food. As they were walking from the market back across the street they saw Mendez, who appeared to be "staggering" from one side of the crosswalk to the other. It appeared that he "wasn't in his right mind." Brown, who was holding her son's hand, moved closer to Ysaguirre to avoid Mendez. However, Mendez bumped into Brown's son, causing Brown's arm to be pulled back. When Brown addressed Mendez and told him that he should have said "excuse me," Mendez stopped for a moment and glanced back at Brown. Ysaguirre also told Mendez that he should apologize for bumping into them. In response, Mendez repeatedly said, "I didn't see your fucking son." To Brown, it seemed as though Mendez was slurring his words and she thought he might have been intoxicated. Judging from the way he was repeating himself, the way he was looking at Ysaguirre and the fact that he turned around and was headed in their direction, Brown believed Mendez wanted to "start something."

Brown, her son and Ysaguirre walked back to the DMV with Mendez following closely behind. Mendez continued to state that he had not seen Brown's son. At some point Brown, her son and Ysaguirre got ahead of Mendez and Brown believed the incident was over. However, just a few moments after they arrived back at the DMV, Brown saw Mendez walk through some bushes holding a cane. Mendez approached them, holding his cane upright like a weapon. As Mendez walked toward them, Brown and her son moved away from Ysaguirre. Mendez approached Ysaguirre until the two were "face to face" and said, "I told you I didn't see your 'f'ing' son." Brown turned

away as she did not want to see what was going to happen. The next thing she heard was “everybody yelling.” She then heard what sounded like a “loud impact.” When Brown turned around, Mendez was on the ground. Ysaguirre was standing to the side of him. A group of people surrounded Ysaguirre so that he could not leave the area. Police officers and paramedics arrived approximately 10 minutes later.

West Covina Police Officer David Reyes responded to a call regarding a battery at the DMV. Several other officers had also responded, but Reyes was the one who wrote the report. He interviewed Brown for between 15 and 20 minutes. Reyes also interviewed Luke M. Rivera, and spent approximately 20 minutes interviewing Ysaguirre. The officer then incorporated the four individuals’ statements into his police report. A review of Reyes’s report indicates that Luke M. told him that Ysaguirre struck first, knocking Mendez to the ground. According to Luke M., Mendez “fell back and struck his head on the floor, and then Mr. Ysaguirre . . . hit him one more time.”

Twenty-two-year-old Ysaguirre testified that, upon arriving at the DMV, his girlfriend, Latasha Brown, took a number and he, Brown, and Brown’s then four-year-old son got into line. Since it appeared there were approximately 100 people in line before them and it was just before noon, or “[a] little bit before lunch time,” Ysaguirre and Brown decided to go get something to eat while they waited. Brown suggested they go to the Von’s Market across the street.

On the way back from the market, Ysaguirre and Brown encountered Mendez. He was in the middle of the intersection, was “swaying” and “look[ed] disheveled.” Ysaguirre moved to his left in an attempt to avoid colliding with Mendez. Brown, who

was holding her son's hand, also moved to the left. However, Mendez, who was not carrying a cane at that time, veered in their direction and bumped into Brown's son. Ysaguirre was "mad" at Mendez because he believed that "anybody in their right mind [would], if they bump into a child, . . . automatically bend down and acknowledge the child and acknowledge the parents and say, excuse me, I'm sorry, something like that." Mendez "didn't say anything." Ysaguirre addressed Mendez and stated, "Hey, you just banged into my child." At first Mendez did not respond. He "stared in a daze [as if] he didn't know what was going on." Ysaguirre addressed him again, stating, "Sir, do you just realize what just happened, you just bumped into my son, can you at least apologize to him?" Mendez responded by saying, "I didn't see your fucking son." Ysaguirre then told Mendez, "I could see you're a little ignorant, and next time just watch where you're going." However, Mendez again responded by saying that he had not seen Ysaguirre's "fucking son." At Brown's suggestion, she, her son and Ysaguirre started walking back toward the DMV. Instead of continuing across the street, Mendez turned around and followed them. As he walked back, Mendez continued to say, "I'm telling you[,] I didn't see your 'f'ing' son, what do you want to do?" As they were walking toward the DMV, Mendez moved in so that he was face to face with Ysaguirre. He then "snatched off his hat, and he snatched off his shades" and again asked Ysaguirre what he wanted to do. At this point, Ysaguirre was "fearful" of Mendez, who, in addition to being physically larger than Ysaguirre, had red eyes, one of which was "a little cockeyed." At Brown's suggestion, they walked away from Mendez and continued on toward the DMV. As they walked back, Ysaguirre continually looked back over his shoulder to see if Mendez was

following them. When it appeared that he was not, Ysaguirre believed the incident was over.

After arriving at the DMV, Brown, Ysaguirre and Brown's son got back into line and sat down on the curb. Approximately five minutes later, Mendez appeared carrying a cane. He was not using the cane to walk, but was holding it at an angle several inches above the ground. Not wishing to show that he was afraid, Ysaguirre stood up and walked away from Brown and her son. When Mendez then approached Ysaguirre and, once again said that he did not see Ysaguirre's " 'f'ing' " son, Ysaguirre decided to take "action." When Mendez raised his cane, Ysaguirre hit Mendez in the face, knocking him to the ground. Ysaguirre then hit Mendez again, just to make certain that he wasn't going to get up and continue the fight. Ysaguirre stated that he just wanted to "get [Mendez] down so [he] and [his] family could be safe."

After he knocked Mendez down, several people surrounded Ysaguirre and prevented him from leaving the area. He testified that "they probably thought [he] was trying to run away, but [his] direction was going back into the D.M.V. to . . . try to find an officer or something." When police arrived, an officer interviewed Ysaguirre for approximately 20 minutes, then transported him to the station.

Morris Jones has known Ysaguirre for three years. They play hip hop music together. Jones testified that Ysaguirre is "a well-respected person" who is "honest" and "does what he's supposed to do." Jones had seen Ysaguirre in "situations where it looked like somebody might be acting in an inappropriate manner [towards] him" and "[h]e walked away." Jones had never seen Ysaguirre hit anyone.

2. Procedural history.

Prior to trial, defense counsel proposed that Mendez should not be allowed to testify. Noting that Mendez was suffering from the first stages of alzheimer's disease or dementia and that he suffered from several physical ailments, counsel stated: "I don't see why the People are putting him on, you know. I assume they're going to be eliciting some kind of sympathy when they see an old guy hobble up here and he's the victim. [¶] Be that as it may, I'm just letting the court know that's what I'm requesting to do, because I don't think anybody is going to be able to direct or cross[-examine] this guy." The district attorney then indicated that his "point of bringing in the victim [was] so that the jurors [would] understand that—first of all, to have the jurors look at him and determine whether he's the kind of person who's got a threatening appearance to the defendant on the date of the incident. [¶] And, second of all, the jurors would hear firsthand from him that he has no recollection, because [he had] the burden of proof in this case. [He had] to prove to the jurors that, although [he had] all of these witnesses, [his] victim in this case is not able to testify because of his condition and they see firsthand as to why." Defense counsel objected, indicating that the prosecution should not "be able to have it both ways, that they can see that he's not a threat, and yet [defense counsel is] unable to cross[- examine] him when he gets up and testifies." The trial court indicated that it had had a "number of witnesses that ha[d] come through . . . that have not remembered a single thing, and they were able to testify that they didn't remember anything, and they were able to be cross-examined." The court concluded that Mendez could be put on the witness stand and both parties could "proceed." The court indicated

it would discover the “extent to which he can remember or not remember” at that time. The trial court continued: “But to present his physical appearance, to present his demeanor, to present his mental state, we don’t need to examine those out of the presence of [the] jury.”

After the prosecution finished presenting its case, defense counsel moved for the entry of a judgment of acquittal pursuant to section 1118.1. In the alternative, counsel moved to have the alleged crime treated as a misdemeanor pursuant to section 17, subdivision (b). The trial court denied the motions, stating, “I think there’s ample evidence from which a jury could find the defendant to be guilty of the primary charge, and I believe there’s also ample evidence that would sustain a conviction on appeal. [¶] And the court declines its ability to reduce this pursuant to 17(b) based on the running to the scene of the incident and the substantial amount of damages.”

After deliberating for approximately three hours, the jury found Ysaguirre guilty of “battery causing serious bodily injury, in violation of . . . section[s] 242/243(d), a felony, as charged in count 1 of the information.” Sentencing was set for May 20, 2009.

At sentencing proceedings, the trial court indicated that Ysaguirre had retained new counsel and that counsel had submitted to the court a memorandum requesting that Ysaguirre be granted probation. After indicating that it had read the sentencing recommendation submitted by the Probation Department, counsel’s memorandum, the prosecutor’s memorandum and a “number of letters of recommendation filed on Mr. Ysaguirre’s behalf,” the trial court indicated it was going to grant Ysaguirre three years probation primarily because he had a “clean record,” he did not commit the crime

for “financial gain,” and there had been no “gang involvement.” As one condition of probation, Ysaguirre was to serve 60 days in county jail.

The trial court imposed a \$200 restitution fine (§ 1202.4, subd. (b)), a stayed \$200 probation revocation restitution fine (§ 1202.44), a \$20 court security fee (§ 1465.8, subd. (a)(1)) and a \$30 assessment for Ysaguirre’s criminal conviction (Gov. Code, § 70373). In addition, Ysaguirre was assessed \$8,674.06 for attorney fees, payable to the court clerk’s office by May 20, 2010 (§ 987.8). Ysaguirre was given precommitment custody credit for 30 days actually served and 14 days of conduct credit, for a total of 44 days.

Ysaguirre timely filed a notice of appeal on May 20, 2009.

This court appointed counsel to represent Ysaguirre on appeal on August 25, 2009.

CONTENTIONS

After examination of the record, counsel filed an opening brief which raised no issues and requested this court to conduct an independent review of the record.

By notice filed October 26, 2009, the clerk of this court advised Ysaguirre to submit within 30 days any contentions, grounds of appeal or arguments he wished this court to consider. No response has been received to date.

REVIEW ON APPEAL

We have examined the entire record and are satisfied counsel has complied fully with counsel’s responsibilities. (*Smith v. Robbins* (2000) 528 U.S. 259, 278-284; *People v. Wende* (1979) 25 Cal.3d 436, 443.)

DISPOSITION

The judgment is affirmed.

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CROSKEY, Acting P. J.

We concur:

KITCHING, J.

ALDRICH, J.